PROPOSED ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2009-XXXX

IN THE MATTER OF
TEHAMA MARKET ASSOCIATES, LLC
AND
ALBERT GARLAND
LINKSIDE PLACE SUBDIVISION
BUTTE COUNTY

STAFF REPORT

Background

The Central Valley Regional Water Quality Control Board (Central Valley Water Board) issued a $250,000 administrative civil liability against Tehama Market Associates, LLP (Tehama Market) and its principal, Albert Garland (Dischargers), in Administrative Civil Liability Order No. R5-2007-0054 (2007 ACL Order). The Dischargers filed a writ of mandate challenging the ACL Order. The court upheld the 2007 ACL Order in all respects, except that the court found that Findings 10 and 28, regarding laches, were not supported by the evidence. The court remanded the matter to the Central Valley Water Board to vacate the 2007 ACL Order and conduct further proceedings consistent with the court's ruling.

The proposed revised ACL order revises Findings 10 and 28 in accordance with the court's rulings, and reinstates the $250,000 penalty. The Prosecution Team has not received confirmation that the Executive Officer vacated the 2007 ACL Order in accordance with the court's ruling, but assumes she will do so shortly.

The 2007 ACL Order involved stormwater violations at Phase I of a larger residential subdivision in Oroville, Butte County. In September 2000, William Isaac (Isaac) purchased two adjacent tracts of land, with the intention of developing a residential subdivision called Linkside Place. Phase I, also known as Linkside Place I, involved the construction of 65 homes on the northern parcel. The second phase of the development—Linkside Place II—involved the construction of another 59 houses, primarily on the southern site but included some development on the southern portion of the northern site.

On 9 April 2002, Isaac sold both tracts of land to Linkside Place LLC, a Nevada limited liability company. In September 2002, Linkside Place LLC conveyed both parcels back to Isaac. While the property was under Isaac's ownership, Isaac authorized Garland "to sign any documents necessary to further the progress on the subdivision in Oroville." In that capacity, Garland submitted a Notice of Intent to comply with the terms of the General Permit to discharge stormwater associated with construction activity for the Phase I development, and paid the $700 annual fee. Garland listed himself as the contact person for Isaac and signed the NOI on Isaac's behalf as the project manager.

Under Garland's management, a Stormwater Pollution Prevention Plan (SWPPP) for Phase I was prepared.

On 31 December 2003, Isaac sold *the northern parcel only* (i.e., Phase I) to Tehama Market. Garland continued to conduct himself as if the October 2003 coverage was in full force and effect by discussing permit compliance with staff during site inspections. Bert Garland was present as the only Linkside Place LLC representative at our NOV site inspection conducted on 20 April 2004 at Linkside Place Phase 1. He personally indicated to Scott Zaitz, of the Central Valley Water Board, that all NOV problems observed during the 18/25 February 2004 site inspections would be rectified. He had a copy of the NOV with him at this time. According to Mr. Zaitz, at no time did Mr. Garland state that he was under the impression that the site was not covered under the General Permit during the inspections that generated the NOV or during the site visit on 20 April 2004.

Tehama Market owned the Phase I parcel for ten months before selling the property back to Linkside Place LLC on 4 October 2004. It was during this ten month period when Tehama Market owned the property that the violations at issue occurred. A revised SWPPP was submitted to the Central Valley Water Board on 6 May 2004 covering not just Phase I, but the entire development. The revised SWPPP stated that E-Ticket Construction, Inc. was the contractor and Mr. Bert Garland of Garland & Associates, Inc was the developer the SWPPP did not list the property owner and did not have any wet signatures on the Section 1.2 Owner/Developer Approval and Certification page, On 30 June 2009 Mr. Zaitz contacted Hanover Environmental and asked them if they had any wet signatures on file that were submitted when the revised SWPPP was issued, they indicated that they did not know what they could actually legally release in regards to their file and did not want to open themselves to a lawsuit.

After the October 2004 sale, both parcels were again owned by the same entity. Garland continued working on both phases of the development without notifying the board about the ownership changes. At one point, the Dischargers' counsel explained to the Assistant Executive Officer of the Regional Board, Mr. Pedri, that the property transfers were for tax purposes. The Phase I parcel was ultimately sold to Linkside Place Inc., an unrelated entity, on February 25, 2005.

Staff was unaware of the ownership history at the commencement of this action. Staff issued a total of four complaints, as follows:

- 23 November 2004: The original complaint in this matter was issued to Linkside Place LLC, and sent to William Isaac. Staff received a phone call in December 2004 from a prospective buyer of the property, and learned about the 2005 sale. A property ownership search was conducted at Butte Co Assessor Office in June 2005, Mr. Zaitz wrote two separate personal checks to cover copying fees in June 2005 to the Butte Co Assessor Office.

- 25 January 2006: After staff learned the correct ownership information, the complaint was rescinded and reissued to Tehama Market. The complaint alleged that permit coverage had "effectively transferred" from Isaac to Tehama Market, and alleged violations of the General Permit requirements.

- 26 October 2006: The complaint was rescinded and reissued to name Albert Garland as a responsible corporate officer, in addition to Tehama Market. The complaint continued to allege "effective transfer" of permit coverage.

- 20 April 2007: Staff issued ACL Complaint No. R5-2007-0500. The operative complaint alleged that permit coverage had not transferred, and that stormwater discharges violated the Water Code and Clean Water Act prohibitions against discharging without a permit. Staff did not know about the property transfer until it was researched in June 2005, and staff believed that Linkside Place LLC was William Isaac's business so that they were one in the same.

The final complaint was issued three years and 61 days after the first of the two violations charged in the complaint. However, both Tehama Market and Albert Garland were named as Dischargers for the same violations less than three years after the violations occurred. Staff made clear throughout the process that they intended to prosecute the matter absent a settlement.

The Doctrine of Laches

Laches is an equitable defense in civil actions that protects parties from having to defend "stale" actions. Laches is similar to statutes of limitation, but is an equitable defense based on principles of fairness rather than a specified deadline for filing a complaint. In general, a defendant asserting a laches defense must prove that the delay in bringing the action was inexcusable, and that the delay prejudiced the defense. The laches defense is unavailable unless the defendant proves both elements.

Courts considering a laches defense sometimes "borrow" an analogous statute of limitations, and shift the burden of proof to the person bringing the action. In that case, the person prosecuting the action must prove that delay beyond the borrowed statutory time limit *was* reasonable, and that the defendant was *not* prejudiced. The Dischargers in this case argued to the trial court that the court should "borrow" the three-year statute of limitations for *judicial* actions under the Porter-Cologne Water Quality Control Act. (CCP § 338, subd. (i).) Under the burden-shifting approach, the "delay" that is relevant to considering the factors is the 61 days after the end of the borrowed three-year period.

The three-year statute of limitations does not apply to *administrative* civil liability actions before the board. The doctrine of laches, as an equitable doctrine and not a statutory mandate, is more flexible than a statute of limitations, and laches cannot be used to "backdoor" an inapplicable statute of limitations. The mere fact that more than three years passed between the violations and issuance of the complaint is not enough to support a laches finding. (*Fahmy v. Med. Bd. of Ca.* (1995) 38 Cal.App.4th 810, 816;

Fountain Valley Regional Hospital & Medical Ctr. v. Bonta (1999) 75 Cal.App.4th 316, 325.)

Even where it does apply, the three-year statute of limitations for judicial actions under Porter-Cologne states, in part, "The cause of action in that case shall not be deemed to have accrued until the discovery by the State Water Resources Control Board or a regional water quality control board of the facts constituting grounds for commencing actions under their jurisdiction." In this case, staff reasonably relied on the Dischargers' legal obligations to notify the board of ownership changes, and did not learn of the Tehama Market's ownership until June 2005

Court Ruling on Laches

Since laches is an equitable defense, it is not available to a discharger who has "unclean hands" or whose conduct estops (precludes) the discharger from relying on the laches defense. In the 2007 ACL Order, the Central Valley Water Board found that laches did not apply because the Dischargers were responsible for a substantial portion of the delay. The court rejected the board's finding that the laches defense was unavailable due to unclean hands or estoppel, and ruled that the board did not adequately consider the laches defense. The court found:

- There was insufficient evidence to support the finding that the property changed hands "several times" after obtaining permit coverage; in fact, it changed hands only once, from Isaac to Tehama Market.

- There was no evidence to support the finding that staff did "extensive research" to find the owner. Rather, the first complaint, filed nine months after the violations, named the wrong entity even though staff had the assessor's parcel number (APN) of the site and apparently failed to review the assessor's public records for another nine months.

- Dischargers have an absolute legal right to request extensions to respond to a complaint and to state alternate defenses, and have no obligation to help staff build a case. Putting up a vigorous defense, in and of itself, does not constitute unclean hands or support an estoppel theory.

- The board found that the delay was attributable in part to the Dischargers changing their position about whether or not the site had permit coverage. However, the court found that the board did not explain why the Dischargers' inconsistent legal positions caused a delay of more than three years.

The court found that the three-year statute of limitations did not apply to an administrative civil liability proceeding. The court did not find that it was appropriate to borrow that statute of limitations. Moreover, the court did not find that the factors cited were insufficient to show that the delay was reasonable, because the court did not consider that. The court's conclusion that the discharger has a legal right to put up a

vigorous defense therefore does not address whether staff acted reasonably in delaying this action. The court simply found that there was insufficient evidence to support theories of unclean hands or estoppel, both of which prevent a discharger from asserting laches based on the discharger's improper conduct. In contract, the consideration of whether the delay was reasonable does not attribute fault or blame to either party. Rather, because laches is an equitable defense, the board should consider the totality of the circumstances of this case – the repeated property transactions, staff's reliance on the legal requirement to provide notice of transfer, the lengthy settlement discussions, the parties' requests for continuance and the Dischargers' knowledge that prosecution would proceed – to determine that the delay was reasonable in these circumstances and that no prejudice to the Dischargers resulted.

The Delay Was Reasonable

The General Permit states that it is not transferable. When property is transferred, the seller/permittee must file a Notice of Termination or Change of Ownership form and inform the new owner to obtain permit coverage, and the new owner must obtain permit coverage by filing a Notice of Intent. (General Permit Fact Sheet, pp. 3-4; Special Provisions C.7-C.8; Standard Provision C.18.) Neither the Dischargers nor the prior owner submitted any of the required forms or informed staff about the change of ownership. Staff reasonably relied on the Dischargers' and former owner's legal obligations to provide this information, as well as staff's experience that property transfers are generally reported. Property transfers are normally reported because the original property owner does not want to be on the hook if something bad happens and also for relieving them of the annual fee. In addition, Linkside Place representatives participated in settlement discussions for approximately 6 months (Dec 2004-June 2005) without informing staff that Linkside Place LLC was not a responsible party at the time the violations occurred. In fact, Tehama Market asserted in March 2006 that it *was* covered by the permit.

It was reasonable for staff to rely on the Dischargers' statements and conduct given the legal requirement to report ownership information. Staff's experience is that former owners who are not "dischargers" do not participate in lengthy settlement discussions or respond to proposed enforcement actions while tacitly admitting their status as dischargers. Staff reasonably did not investigate the chain of title until a prospective purchaser called to check ownership. Staff was under the impression that Linkside Place LLC and Isaac were one in the same, it was not until staff conducted a record search in June 2005 that staff became aware of the property transfers to Tehama Market Assoc. and them back to Linkside Place LLC.

Delay is reasonable when used to prepare and evaluate complicated claims. (*Magic Kitchen LLC v. Good Things Int'l Ltd.* (2007) 153 Cal.App.4th 1144, 1160.) This matter was not just complicated by the title history of the site. The Supreme Court decided *Rapanos v. United States* (2006) 547 U.S. 715 in June 2006. The Dischargers asserted *Rapanos* as a defense in this action in written comments dated 20 December 2006.

Although staff concluded that *Rapanos* was not controlling in this case, it still added additional complexity late in the game.

Even where a statute of limitations applies, courts have developed a doctrine of equitable tolling in some cases to extend the statute of limitations in some cases to avoid unfairness. For example, a statute of limitations is tolled when the plaintiff pursues a related action in a different forum (*Elkins v. Derby* (1974) 12 Cal.3d 410). The Supreme Court noted in *Elkins* that "this and other courts as well as legislatures have liberally applied tolling rules or their functional equivalents to situations in which the plaintiff has satisfied the notification purpose of a limitations statute." (*Elkins, supra,* 12 Cal.3d at 418). Similarly, a statute of limitations is equitably tolled where an insurance company pursues settlement (*Ashou v. Liberty Mut. Fire Ins. Co.* (2006) 138 Cal.App.4th 748.) Equitable tolling furthers the possibility of settlement, while still affording prompt notice to the insurer of a pending action. (*Id.,* 138 Cal.App.4th at 757, 763.)

Staff made it clear at all times that prosecution would proceed absent a settlement, and delayed the first action for approximately 6 months while the parties (and Isaac) diligently pursued settlement discussions. Although not strictly applicable, the principles behind the equitable tolling doctrines support the reasonableness of the short delay in this case.

The Delay Did Not Cause Prejudice to the Dischargers

Delay can cause prejudice to a defendant where witnesses or evidence are no longer available, witnesses forget what they observed, or the defendant incurs costs based on an assumption that the failure to prosecute means acquiescence in the prior conduct. No such prejudice resulted from any delay in this case.

A 24 February 2005 site inspection confirmed that the Phase I property was generally incompliance with the General Permit and that Mary Randall contacted Bart Fleharty and told him that based on this inspection, that James Pedri did not intend to take additional enforcement action against Mr. Isaac. Much of the internal area had been paved or rocked, the building pads had been hydroseeded and there was lots of vegetative cover, the site's erosion and sediment control best management practices had been maintained appropriately and there was adequate BMP deployment at the drop inlets. A few of the drop inlets had some standing water that was not turbid indicating that the BMPs deployed were being effective. Thus, no further action was necessary to bring the site into compliance with the General Permit or SWPPP-Although there was a May 2005 inspection that indicated that, once again, there were problems with Phase 1, but at this time Linkside Place Inc (Chad and Craig Hawes) were the owners. The Dischargers would not have recognized any cost savings if staff had issued the fourth complaint a few months earlier.

Both Tehama Market and Garland were on notice that this action was being prosecuted against them less than three years after the violations. In fact, had staff amended the

complaint rather than rescinding and reissuing it, the "analogous" three-year statute of limitations would not even come into play. The Dischargers' counsel had the opportunity to take staff's depositions to preserve evidence or testimony, and did take Scott Zaitz's deposition in June 2005. Although Mr. O'Laughlin was representing Linkside Place and Isaac when he took the deposition, Mr. O'Laughlin also represented the Dischargers at the hearing on this matter. At any rate, the Dischargers called no witnesses and presented no evidence at the hearing, so the Dischargers cannot complain about dim memories or unavailable evidence.

Summary and Recommendation

Whether the Dischargers or the Prosecution Team has the burden of proof, the defense of laches does not bar this action. The short delay beyond the three-year statute of limitations was reasonable given the totality of the circumstances, and the Dischargers suffered no prejudice. The Prosecution Team recommends reissuance of the 2007 ACL Order as proposed, with revised Findings 10 and 28.

Attachments
- 6 April 2009 Ruling on Petition for Writ of Mandate
- 7 May 2009 Judgment
- 13 May 2009 Writ of Mandate
- The agenda materials for the 2007 ACL Order are available at www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/0706/index.shtml (agenda item 7).